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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE APPLICATION OF EURASIAN
NATURAL RESOURCES CORPORATION
LTD.,

Applicant.

Case No. 3:18-mc-80041-LB

**DECHERT LLP'S NOTICE OF
MOTION AND MOTION TO
PARTICIPATE IN DISCOVERY
PROVIDED PURSUANT TO 28 U.S.C. §
1782, AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

**Date: April 19, 2018
Time: 9:30 a.m.
Dept: Courtroom C
Judge: Honorable Laurel Beeler**

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NOTICE OF MOTION AND MOTION

NOTICE IS HEREBY GIVEN that, on April 19, 2018, at 9:30 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Laurel Beeler, United States District Court for the Northern District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, Dechert LLP (“Dechert”) will and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 24 and 45 for an order permitting Dechert to appear in this proceeding for the limited purpose of obtaining any documents and deposing the witness produced in response to the subpoena served by Applicants Eurasian Natural Resources Corporation Ltd. (“Applicant” or “ENRC”) on Danny Fortson (“Fortson”). This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the argument of counsel, all pleadings, records and papers on file, and such other matters that may be presented to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Applicant has submitted an Application under 28 U.S.C. § 1782 (the “Application”), seeking to serve a Rule 45 subpoena on Fortson for the production of documents and deposition testimony. Applicants have explicitly stated that they seek such discovery “for use in a contemplated action in the United Kingdom,” and that the discovery “is relevant to potential claims that ENRC is reasonably likely to bring [against Dechert].” Application (ECF 1) 1:26-27, 2:19-20. According to Applicant, it seeks discovery to “establish a claim that Dechert LLP violated its duty to safeguard confidential information.” *Id.* 3:9-10. The Application is currently before the Court. To date, no notice of these proceedings has been provided to Dechert. Dechert has learned of these proceedings through the media.

As described in detail below, controlling precedents require that Dechert – as the party against whom Applicant seeks to deploy the discovery obtained from Fortson in its threatened lawsuit – is entitled (a) to receive copies of any and all documents produced by Fortson to Applicant; (b) to attend and participate in any deposition(s) of Fortson taken by Applicant and to

1 depose Fortson; (c) to be served with all notices, pleadings, submissions, correspondence, and
 2 other materials submitted or exchanged in these proceedings; and (d) to obtain such further relief
 3 as may be proper.

4 **FACTUAL BACKGROUND**

5 By Application dated February 23, 2018, Applicant filed an Application for Discovery for
 6 Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782 (the “Application”) (ECF 1). Section
 7 1782 permits a court to authorize discovery “for use in a proceeding in a foreign or international
 8 tribunal . . . in accordance with the Federal Rules of Civil Procedure.” 28 U.S.C. § 1782(a). The
 9 Application seeks to serve Fortson a subpoena for documents and testimony related to a letter
 10 written by Dechert to ENRC that Fortson obtained, the contents of which was reflected in an
 11 article he wrote that was published in *The Sunday Times*. Application (ECF 1) 2:24-26; 3:13-14.

12 ENRC had previously retained Dechert LLP to provide legal services relating to the
 13 investigation of a whistleblower’s claim that one or more ENRC subsidiaries engaged in
 14 wrongdoing. ENRC eventually terminated the retainer, and Dechert wrote a letter to ENRC
 15 concerning the termination of the retainer. *Id.* 2:19-24. This letter was later leaked to Fortson,
 16 who used it to write an article published in *The Sunday Times*, which revealed the contents of the
 17 letter. *Id.* 2:23-28. The article recounted that the letter contained allegations of ENRC
 18 misconduct, including evidence that documents had been falsified and destroyed, use of
 19 electronic wiping tools by employees, payments to African presidents, and creation of a false
 20 office. Boyd Decl., Ex. A. Applicant expressly seeks this discovery for use against Dechert “in a
 21 contemplated action in the United Kingdom,” and asserts the discovery “is relevant to potential
 22 claims that ENRC is reasonably likely to bring [against Dechert].” Application (ECF 1) 1:26-27,
 23 2:19-20.

24 According to Applicant, it seeks discovery to “establish a claim that Dechert LLP violated
 25 its duty to safeguard confidential information” that was contained in the letter. *Id.* 2:28-3:7; 3:9.
 26 Applicant’s subpoena seeks certain categories of documents from Fortson, including “[a]ll
 27 documents reflecting or constituting communications with and all documents received from
 28

Dechert . . . which refer or relate in any way to ENRC” and “[a]ll documents describing, reflecting, or constituting communications between Dechert LLP and ENRC, and all documents constituting transmittals or containing any discussion of such communications.” Boyd Decl., Ex. B. The subpoena also seeks deposition testimony of Fortson. *Id.* Despite making serious allegations before this Court that Dechert “violated its duty” to Applicant to safeguard its confidential information, the publishing of which was “highly prejudicial” to ENRC, Applicant did not serve their Application (or accompanying submissions) on Dechert. Application (ECF 1), 3:7-10. Dechert has not received any notice of these proceedings but instead learned of them only through the media. If and when Applicant brings its threatened claim, Dechert will respond as appropriate to its allegations in that forum.

However, because Applicant has served its discovery on Fortson for the express purpose of gathering materials to use in a claim against Dechert, it is fair and appropriate that Dechert be allowed to obtain copies of any documents and to participate in the deposition of Fortson in response to Applicant’s Subpoena. At this juncture, Dechert takes no position on the propriety of the discovery sought by Applicant in its Subpoena, nor on any arguments or defenses that Fortson may raise in response to the Subpoena.

ARGUMENT

I. DECHERT HAS STANDING TO PARTICIPATE IN DISCOVERY UNDER 28 U.S.C. §1782 THAT IS SOUGHT FOR THE EXPRESS PURPOSE OF BRINGING CLAIMS AGAINST IT

The federal courts have repeatedly held that where discovery is sought under 28 U.S.C. § 1782, the party against whom the discovery is to be used has standing to participate in the proceedings, and to object to the discovery itself. As the Ninth Circuit has explained, “[t]he party against whom [discovery is] to be used has standing to challenge the validity of the order . . . to produce the records.” *In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea*, 555 F.2d 720, 723 (9th Cir. 1977). *See also Kuwait Inv. Auth. v. Sarrio S.A. (In re Sarrio, S.A.)*, 119 F.3d 143, 148 (2d Cir. 1997) (“[A] party against whom the requested information is to be used has standing to challenge the validity of such a subpoena on the ground

1 that it is in excess of the terms of . . . § 1782.”); *In re Republic of Ecuador*, No. C-10-80225 ,
 2 2011 WL 736868, at *10, n.2 (N.D. Cal. Feb. 22, 2011) (“Although Chevron did not move to
 3 intervene, it has standing as a party to the underlying litigation to object to discovery sought from
 4 third parties”); *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870
 5 F.2d 686, 689 (D.C. 1989) (“One against whom information obtained under Section 1782 may be
 6 used, has standing to assert that, to his detriment, the authority for which the section provides is
 7 being abused.”).

8 For instance, in *In re Hornbeam Corp.*, No. 1:14-mc-00424, 2015 WL 13647606
 9 (S.D.N.Y. Sept. 17, 2015), *aff’d sub nom., Symeou v. Hornbeam Corp. (In re Hornbeam Corp.)*,
 10 No. 17-658-CV, 2018 WL 416486 (2d Cir. Jan. 16, 2018), the party against whom the discovery
 11 was to be used moved to intervene and challenge a subpoena in proceedings brought under 20
 12 U.S.C. § 1782. The court stated that because the movant had “standing to challenge the issuance
 13 of § 1782 subpoenas . . . it does not appear necessary for me to determine whether [the movant]
 14 satisfies the requirements for intervention of right or permissive invention.” *Id.* at *2 (citing *In re*
 15 *Sarrio, S.A.*, 119 F.3d at 148). Nonetheless, the court held that to the extent any ruling on
 16 intervention was required, the movant easily satisfied the standards for permissive intervention,
 17 given that the movant was the intended target of the discovery materials sought by the Applicant
 18 in that case. *Id.*; *see also In re Rivada Networks*, 230 F. Supp. 3d 467, 471-74 (E.D. Va. 2017)
 19 (holding “Altan Redes may intervene in this matter, as it is well-settled that a ‘part[y] against
 20 whom the requested information will be used . . . has standing to challenge the issuance of § 1782
 21 subpoenas.’” and Altan Redes should have received notice of both subpoenas and depositions)
 22 (internal citation omitted).

23 Although Dechert of course reserves the right to object to the use of any materials
 24 obtained by Applicant in the claim it intends to commence, Dechert does not currently intend to
 25 lodge its own objections to Applicant’s discovery requests in this proceeding. Rather, Dechert
 26 simply seeks to participate in any discovery – *i.e.*, to receive any and all documents and/or other
 27 discovery materials produced by Fortson, to attend any depositions taken of Fortson, and to
 28

1 depose Forston itself. Just as Dechert has standing to object to Applicant's discovery, Dechert
 2 has standing to participate in such discovery, and this Court should grant Dechert's motion that it
 3 be allowed to do so. Dechert submits that this Court may issue an order allowing Dechert to
 4 participate in such discovery even without a formal order of intervention.

5 **II. IN THE ALTERNATIVE, THE COURT SHOULD ALLOW DECHERT TO**
 6 **INTERVENE AND PARTICIPATE IN DISCOVERY IN THESE PROCEEDINGS**

7 In the event the Court deems intervention necessary for Dechert to participate in discovery
 8 in these proceedings, then Dechert moves the Court for an order pursuant to Federal Rule of Civil
 9 Procedure 24, specifically allowing Dechert to intervene and participate in discovery in these
 10 proceedings.

11 Rule 24 is "broadly interpreted in favor of intervention." *California v. Health & Human*
 12 *Services*, No. 17-CV-05783-HSG, 2018 WL 574882, at *4 (N.D. Cal. Jan. 26, 2018) (quoting
 13 *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011)). Courts
 14 are to take all well-pleaded, nonconclusory allegations in the motion to intervene as true absent
 15 sham, frivolity or other objections. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810,
 16 820 (9th Cir. 2001). As set forth below, Dechert meets the requirements to intervene as of right
 17 under Federal Rule 24(a), as well as the requirements for permissive intervention under Rule
 18 24(b).

19 **1. Dechert Has the Right to Intervene Under Rule 24(a)**

20 Dechert has the right to intervene in these proceedings under Federal Rule of Civil
 21 Procedure 24(a). According to Rule 24(a) (2):

22 [T]he court must permit anyone to intervene who: claims an interest relating to the
 23 property or transaction that is the subject of the action, and is so situated that
 24 disposing of the action may as a practical matter impair or impede the movant's
 25 ability to protect its interest, unless existing parties adequately represent that
 26 interest.

27 A party is granted intervention as of right when four conditions are met:

28 (1) the intervention application is timely; (2) the applicant has a significant
 protectable interest relating to the property or transaction that is the subject of the

1 action; (3) the disposition of the action may, as a practical matter, impair or
 2 impede the applicant's ability to protect its interest; and (4) the existing parties
 may not adequately represent the applicant's interest.

3 *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing
 4 *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006)). Dechert meets all four requirements for
 5 intervention as of right.

6 **First**, Dechert's motion is timely. The Ninth Circuit considers three criteria in determining
 7 whether a motion to intervene is timely: (1) the stage of the proceedings; (2) whether the parties
 8 would be prejudiced; and (3) the reason for any delay in moving to intervene. *Northwest Forest*
 9 *Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir.), *as amended on denial of reh'g* (May 30,
 10 1996).

11 These timeliness requirements are met. To begin with, Dechert has moved to intervene at
 12 the very beginning of the proceedings. Dechert is filing this Motion shortly over two weeks after
 13 the filing of the Application. *See* Application ECF 1 (filing date of 2/23/2018). Indeed, to the
 14 best of Dechert's knowledge, Fortson, the recipient of the subpoena, has not yet appeared in these
 15 proceedings as of the date of this submission. Dechert's motion is timely by any standard.
 16 *Citizens for Balanced Use*, 647 F.3d at 897 ("Applicants filed their motion to intervene in a
 17 timely manner, less than three months after the complaint was filed and less than two weeks after
 18 the Forest Service filed its answer to the complaint."); *United States v. Carpenter*, 298 F.3d 1122,
 19 1125 (9th Cir. 2002) (finding that a motion to intervene was timely even though it was filed 18
 20 months after the commencement of a case).

21 Furthermore, there is no prejudice to Applicant or Fortson because Dechert simply seeks
 22 copies of the discovery, to attend Applicant's deposition of Fortson, and to depose Fortson; this
 23 will impose an insignificant burden on Fortson, as he must already produce the same materials to
 24 Applicant and be deposed by Applicant. Rather, if Dechert's motion is not granted, then Dechert
 25 will clearly be prejudiced if it cannot obtain discovery that will be used against it in a lawsuit.
 26 Moreover, Dechert's motion is filed before the Court has made any substantive rulings. *Northwest*
 27 *Forest Res. Council*, 82 F.3d at 837 (finding no prejudice to either party since the motion was
 28

1 filed before the district court made any substantive rulings.). Finally, although there was no delay
 2 in intervening, no formal notice has been provided to Dechert of these proceedings. Rather, as
 3 stated above, Dechert learned of these proceedings only through the media and acted
 4 expeditiously to intervene once learning of them.

5 **Second**, Dechert has a direct interest in the discovery that is the subject of the Application.
 6 To demonstrate a significant protectable interest, an applicant must establish that the interest is
 7 protectable under some law and that there is a relationship between the legally protected interest
 8 and the claims at issue. *Citizens for Balanced Use*, 647 F.3d 893at 897 . Courts have
 9 acknowledged that intervenors have a legally protectable interest in such matters; this interest
 10 permits intervenors to contest such discovery orders. *See, e.g., In re Sarrio, S.A.*, 119 F.3d at 148.
 11 Here, although Dechert was not subpoenaed, the subpoenaed discovery is intended for use against
 12 Dechert in a future lawsuit. Dechert plainly has a direct, substantial, and legally protectable
 13 interest in the discovery.

14 **Third**, if only the Applicant, and not Dechert, can obtain the 28 U.S.C. § 1782 discovery,
 15 then Applicant will gain an unfair advantage against Dechert in the future proceedings. Dechert
 16 will be denied access to information that may help or harm its case, which Applicant will be able
 17 to freely use – or not use – against Dechert. Thus, unless Dechert is granted the relief it seeks in
 18 this motion, Dechert’s ability to protect its interests will, as a practical matter, be impaired or
 19 impeded.

20 **Fourth**, Dechert’s interests in this matter are not adequately represented and protected by
 21 the current parties to this action: Applicant and Fortson. The last requirement for intervention as
 22 of right (*i.e.*, showing that the applicant’s interest is not adequately represented by the other
 23 parties) “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate;
 24 and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine*
 25 *Workers of America*, 404 U.S. 528, n.5 (1972). Here, there is no “existing party” to represent
 26 Dechert’s interests. To the contrary, Applicant has commenced these proceedings for the express
 27 purpose of enabling them to commence a lawsuit against Dechert. Nor is there any reason to
 28

1 think that Forston will represent any interests other than his own or his current or former
 2 employer in this matter. Absent intervention, Dechert's interests are not represented at all, let
 3 alone adequately represented.

4 Accordingly, Dechert meets all of the requirements for intervention as of right under Rule
 5 24(a)(2). The Court should therefore grant Dechert's motion.

6 **2. Dechert Should Be Permitted to Intervene Under Rule 24(b)**

7 In the alternative, the Court should grant Dechert permissive intervention under Federal
 8 Rule of Civil Procedure 24(b).

9 Federal Rule of Civil Procedure 24(b) governs permissive intervention. The Ninth Circuit
 10 has held that permissive intervention to litigate a claim on the merits under Rule 24(b) requires
 11 (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of
 12 law and fact between the movant's claim or defense and the main action. *Beckman Indus., Inc. v.*
 13 *Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). "In exercising its discretion" on this issue, "the
 14 court must consider whether the intervention will unduly delay or prejudice the adjudication of
 15 the original parties' rights." Fed. R. Civ. P. 24(b)(3); *Health & Human Servs.*, 2018 WL 574882,
 16 at *4.

17 Courts have broad discretion to grant permissive intervention. *Doe v. Harris*, No. C12-
 18 5713, 2013 WL 140053, at *2 (N.D. Cal. Jan. 10, 2013); *see, e.g., In re Grupo Unidos Por El*
 19 *Canal S.A.*, No. 14-mc-80277, 2015 WL 1815251, at *6 (N.D. Cal. Apr. 21, 2015) (granting
 20 motion where Applicant had "not credibly identified any prejudice or undue delay it will suffer as
 21 a result of . . . intervention"); *Harris*, 2013 WL 140053, at *2 (granting permissive
 22 intervention).

23 Dechert meets the requirements for permissive intervention under Rule 24(b)(2). First,
 24 because Dechert is not seeking to litigate a claim on the merits, but rather merely to participate in
 25 discovery, an independent jurisdictional basis is not needed. *See Beckman Indus.*, 966 F.2d at
 26 473 ("[A]n independent jurisdictional basis is not required because intervenors do not seek to
 27 litigate a claim on the merits."); *South Pac. Co. v. City of Portland*, 221 F.R.D. 637, 643 (D. Or.

2004) (where proposed interveners do not seek to litigate a claim on the merits, an independent jurisdictional basis is not needed). Regardless, the sole issue in this proceeding is ENRC's application for discovery pursuant to 28 U.S.C. § 1782, which establishes federal question jurisdiction. *In re Grupo Unidos*, 2015 WL 1815251, at *4 ("GUPC does not dispute that ACP meets the jurisdictional requirement. Indeed, the court exercises federal question jurisdiction over GUPC's application for discovery pursuant to 28 U.S.C. § 1782, which is the sole issue in this proceeding.") (citing *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843-44 (9th Cir. 2011) (jurisdictional requirement stems from "concern that intervention might be used to enlarge inappropriately the jurisdiction of the district courts," which "does not apply ... in federal-question cases when the proposed intervenor is not raising new claims"))).

Next, as set forth above, Dechert's motion is timely. Dechert has moved to intervene at the very beginning of the proceedings, and is filing this Motion shortly over two weeks after the filing of the Application. *See* Application ECF 1 (filing date of 2/23/2018). It also shares common questions of law and fact with the main action. The explicit purpose of Applicant's commencement of this action is to obtain documents for use in the claims it plans to bring against Dechert in the United Kingdom, and Dechert's motion seeks only to participate in discovery under Applicant's Application. *See In re Grupo Unidos*, 2015 WL 1815251, at *5 (motions to intervene indisputably shared many common questions of law and fact with Applicant's underlying Section 1782 application, i.e., whether Applicant's request for discovery meets the statutory requirements of 28 U.S.C. § 1782, and, if so, whether the discretionary factors counsel in favor of granting application). Dechert therefore satisfies Rule 24(b)'s commonality requirement.

Intervention will not unduly delay or prejudice the rights of the current parties. Dechert makes this motion in order to obtain discovery obtained by Applicant and not to contest the Order. Dechert does not inject new issues into the dispute, make the same arguments as an existing party, or seek to unnecessarily prolong a proceeding. *See In re Grupo Unidos*, 2015 WL 1815251, at *5 (finding no prejudice or undue delay after consideration of those factors).

1 Allowing Dechert to participate in the discovery will not cause any delay or prejudice to
 2 Applicant or Fortson, and will protect Dechert's own rights and interests in this matter.

3 Thus, to the extent that the Court determines that Dechert must intervene in these
 4 proceedings to obtain any documents and attend the deposition of any witness produced by
 5 Fortson, then the Court should grant Dechert's alternative request to intervene in this case under
 6 Rule 24(b). *See, e.g., In re Hornbeam Corp.*, 2015 WL 13647606, at * 2 (finding that to the
 7 extent a ruling on intervention was required, then all of the requirements for permissive
 8 intervention were met by the movant, against whom the discovery sought under Section 1782 was
 9 to be used).

10 **III. ANY DISCOVERY OBTAINED IN THIS PROCEEDINGS SHOULD BE** 11 **PROVIDED TO DECHERT**

12 If, for any legitimate reason, Dechert is not able to participate in the discovery in these
 13 proceedings at the same time and in the same manner as Applicant (*e.g.*, if Forston produces the
 14 documents to and/or is deposed by Applicant before the Court can rule on this Motion), the Court
 15 should order Applicant to produce any and all documents or other discovery materials obtained in
 16 these proceedings to Dechert.

17 This is particularly so in the event that the Court rules that Dechert must intervene in this
 18 action to participate in discovery and the Court grants Dechert's request in the alternative for such
 19 intervention. It is well-established that intervenors in an action under Section 1782 are permitted
 20 to obtain copies of the materials produced in the proceedings. *See, e.g., In re Rivada Networks*,
 21 230 F. Supp. 3d at 474 ("It is also appropriate to require [Applicant] to permit [intervenor] to
 22 inspect any documents or tangible things produced pursuant to the subpoena issued by the
 23 magistrate judge."); *In re Application of Hill*, No. 05CV999996, 2007 WL 1226141, at *1
 24 (S.D.N.Y. Apr. 23, 2007) (permitting intervenor in § 1782 Application to serve subpoenas on
 25 third parties for same materials requested by petitioners); *see also In re Baycol Prod. Litig.*, No.
 26 MDL1431, 2003 WL 22331293, at *6 (D. Minn. May 6, 2003) ("grant[ing] the Canadian
 27 Plaintiffs' motion to intervene [in U.S. litigation] only to the extent that they seek access to
 28 documents already produced"); *In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 335 (E.D.

Pa. 2004) (granting foreign entity’s motion to intervene in U.S. class action litigation under Rule 24 and amending the confidentiality order governing the matter to allow the foreign entity to “access discovery materials in [the] case”).

Accordingly, if Dechert is unable to participate in the discovery at the same time and in the same manner as Applicant, the Court should order Applicant to produce copies of any and all documents and other discovery materials (including, without limitation, any transcripts of deposition testimony) that they obtain in these proceedings.

CONCLUSION

For the foregoing reasons, Dechert respectfully requests that the Court grant its Motion to Intervene and Participate in Discovery in these proceedings.

Dated: March 12, 2018

Respectfully submitted,

DECHERT LLP

/s/ H. Joseph Escher III
H. JOSEPH ESCHER III
Attorneys for Dechert LLP